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January 13, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

By Electronic Filing

Re: Joint Petition of Accipiter Communications, Inc. and Qwest Corporation for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules, Petition for Waiver of Sec. 69.3(e)(11) of the Commission's Rules. CC Doc. No. 96-45

Ex Parte Notice

Dear Ms. Dortch:

On January 12, 2011 Lewis van Amerongen, Phillip Sotel, Patrick Sherrill and I, representing Accipiter Communications, Inc. met with Angela Kronenberg, Wireline Legal Advisor to Commissioner Clyburn to discuss Accipiter's Application for Review of the decision of the Wireline Competition Bureau denying the joint Petition of Accipiter and Qwest for waiver of the frozen study area rule.

The Accipiter representatives explained that the record before the Bureau includes a clear showing of several public interest factors supporting a grant of the petition and stated they do not understand why the Bureau concluded that the public interest had not been demonstrated. During the over four years the petition was before the Bureau, the only public interest concern expressed by it or other parties was the provision of High Cost Support to an area served by a CLEC. Because Accipiter agreed to forgo support that concern became irrelevant.

The Accipiter representatives noted that the Arizona Corporation Commission had concluded that the rearrangement of the Qwest/Accipiter service areas boundaries was in the public interest, and that the ACC is composed of five members elected on a statewide basis. With no articulated federal interest in preventing the ACC from regulating these boundaries, and contrary to twenty-five years of precedent, Accipiter remains at a loss to understand why the

Petition was denied. In addition to the two letters in the prior record, the Accipiter representatives noted that the Chairman of the ACC wrote to Chairman Genachowski on December 10, 2010 reiterating that the ACC found the transfer of the area to Accipiter by Qwest was in the public interest.

The Accipiter representatives pointed out the irony that the Bureau's order, if not reversed, could force Accipiter to withdraw from the area depriving consumers there of wireline-based competition for voice and broadband. In turn, the effect would be to reinstate a CLEC's illegal monopoly obtained under a scheme that was originally undone only after intervention from the U.S. Department of Justice and the Arizona Corporation Commission. The denial order serves only the interest of the CLEC in contradiction to the public interest pursuits of the DoJ and ACC.

The attached document summarizing Accipiter's position was left with Ms. Kronenberg. Please contact me if there are any questions on this matter.

Sincerely yours,

David Cosson
Counsel to Accipiter Communications, Inc

Attachment

cc: Angela Kronenberg
Melissa Newman, Qwest

ACCIPITER TALKING POINTS

1. Accipiter Communications requests that the Commission grant its Application for Review of the Wireline Competition Bureau's unprecedented denial of its study area waiver petition. A grant will result in no USF impact and will give due respect to the finding of the Arizona Corporation Commission that the public interest will be served by the extension of Accipiter's study area to include the entire Vistancia development, thereby providing continuity of service as COLR and ETC. See attached ACC letter.
2. The sole purpose of the 1984 study area freeze was to control growth of the USF. Because there will be no USF impact, there is no federal purpose served by preventing the companies from adjusting their service area boundaries as supported and approved by the state commission for valid, articulated reasons.
3. The parties have valid reasons, clearly stated on the record, for requesting the waiver even when there is no USF impact.
4. The Bureau order is inconsistent with well-established precedents and policies and is thereby *ultra vires*.
 - a. Waivers have been granted routinely for twenty-five years in all cases where there was no adverse USF impact.
 - b. The Bureau has recognized the public interest benefit of small, high cost company participation in NECA tariffs and pools.
 - c. The Communications Act presumes ILECs will have ETC and Section 251(c) interconnection obligations
 - d. The Commission in a leading decision refrained on equitable grounds from denying a study area waiver where the parties had undertaken substantial burdens based on a reasonable expectation that they were in compliance with existing guidelines, even though there was a substantial USF impact.
 - e. The Commission has made clear that exclusive service agreements with multi-tenant properties are anti-competitive.
 - f. The Commission's separations rules operate on an ILEC's study area: there are no established rules for determining the intra-interstate allocation of investment and expenses of an ILEC that are not in a study area.
5. Additional public interest factors support grant of the Application
 - a. The regulatory uncertainty as to treatment of investment and expenses may force Accipiter to withdraw from the area.
 - b. In that event, consumers would be left with a provider with monopoly power acquired as a result of an anticompetitive agreement.

- c. Accipiter's rural subscribers will remain highly dependent on USF support because the opportunity to reduce Accipiter's per line cost will be lost.